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## FAX COVER SHEET

TO: Terry Hankerson

FROM: JaNeen Frank

FAX: 202/693-1304

DATE: June 1, 2004

RE: Comments: Proposed Amednment 41 CFR Part 60-1

PAGES: 6 including cover

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### Comments/Special Instructions:

Terry ~

Per our conversation, attached please find the email correspondence (with properties confirmation) and pdf attachment from Cynthia S. Fox, Southwest Airlines Co.

As indicated, this email was delivered/transferred to the dol.gov web-box on May 28<sup>th</sup> at 3:44pm.

Please confirm and provide receipt confirmation.

Should you have any questions, please call me at 214/792-3019. Thank you!

**From:** Cindy Fox  
**To:** Joseph DuBray, Jr.  
**Date:** Fri, May 28, 2004 3:44 PM  
**Subject:** Comments: Proposed Amendment 41 CFR Part 60-1

May 28, 2004

Dear Mr. DuBray:

Please find attached comments submitted by Southwest Airlines Co., Motorola, Inc., and Computer Associates International, Inc. to the proposed amendment to 41 CFR Part 60-1. The comments are attached in a PDF file.

Sincerely,

Cynthia S. Fox  
Chief Counsel  
Southwest Airlines Co.  
2702 Love Field Drive  
Dallas, TX 75235  
[cindy.fox@wnco.com](mailto:cindy.fox@wnco.com)  
(214)792-4046  
(214)792-6200(fax)

**CC:** Jill Goldy; Joel Katz

**SOUTHWEST AIRLINES CO.**  
Cynthia S. Fox  
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May 28, 2004

VIA ELECTRONIC MAIL

Mr. Joseph DuBray, Jr., Director  
Division of Policy, Planning and Program Development  
OFCCP, Room C-3325  
200 Constitution Avenue, NW.  
Washington, D.C. 20210

**RE: Comments to Proposed Rules Amending 41 CFR Part 60-1, of the Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP").**

Dear Mr. DuBray:

This letter is in response to the invitation of the OFCCP for public comments to the notice of proposed rule making amending Section 60-1.3 and Section 60-1.12 of 41 CFR Part 60-1 ("NPRM"), adding a definition of "Internet Applicant" and requiring contractors to retain Internet submissions of interest and to collect gender, race, and ethnicity information from Internet applicants. 69 F.R. 16446 (March 29, 2004).

These comments are submitted on behalf of three federal government contractors: Southwest Airlines Co., Motorola, Inc., and Computer Associates International, Inc. Southwest Airlines Co. ("Southwest") is a federally certificated interstate air carrier employing over 34,000 employees. These comments have been reviewed by the respective representatives of Motorola Corp. ("Motorola") and Computer Associates International, Inc. ("Computer Associates") copied below on this letter, who share Southwest's views in these comments. As all three companies are federal government contractors, they are also subject to both Executive Order 11246 and Title VII of the Civil Rights Act of 1964, as amended in 1991. Southwest, Motorola, and Computer Associates appreciate this opportunity to provide comments on the NPRM.

COMMENTS TO SECTION 60-1.3 PROPOSAL

*Proposed "Internet Applicant" Definition*

The four criteria proposed by the OFCCP to define "Internet Applicant" come much closer to a definition employers would be able to use than the proposal under the Uniform Guidelines on Employee Selection Procedures ("UGESP"). See 69 F.R. 10152 (March 4, 2004). Contrary to the proposal under the UGESP, the Internet Applicant definition proposed by the OFCCP includes a critical additional element: an individual who expresses interest in a position must show that he/she possesses the "advertised, basic qualifications for the position." 69 F.R. 16449. The absence of this element in the UGESP proposal renders it overly broad and

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unduly burdensome on employers to track and maintain records on hundreds of thousands of individuals who do not meet the advertised, basic qualifications required for a position.

The UGESP Internet Applicant definition proposes only three elements, which are similar to the OFCCP proposal: 1) the employer has acted to fill a particular position; 2) the individual has followed the employer's standard procedures for submitting applications; and 3) the individual has indicated an interest in the particular position. 69 F.R. 10155. Notably, the UGESP proposal does not include the advertised, basic qualification element proposed by the OFCCP. Yet in examples discussed in the Questions & Answers ("Q&As") in the UGESP proposal, several suggest that in following an employer's standard procedure for submitting an application, an individual must meet minimum qualifications or requirements established by an employer. (Individuals must be interested in working in the specified geographic service area. Q&A 96, Example A. 69 F.R. 10155-56; individuals must answer a questionnaire providing their relevant work experience. Q&A 96, Example B. 69 F.R. 10156; and individuals must present a minimum amount of work experience to be considered. Q&A 97, Example C. 69 F.R. 10156). The absence of the advertised, basic qualification element in the UGESP proposed Internet Applicant definition, combined with the UGESP Q&As which acknowledge minimum, basic requirements, unfortunately serve to confuse rather than clarify. As discussed below, the UGESP and OFCCP Internet applicant definitions should be aligned and the UGESP definition clarified.

**"Advertised, Basic Qualifications" Is Essential Element of "Internet Applicant" Definition**

Southwest, Motorola, and Computer Associates favor the OFCCP's proposed Internet Applicant definition because it does include acknowledgment of the "advertised, basic qualifications" as part of the definition. 69 F.R. 16449. The "advertised, basic qualifications" is the part of the OFCCP's proposed definition that would allow employers the feasibility to use the definition in collecting applicant data, tracking applicants and recordkeeping. With the technological advances in recent years and the nearly unquantifiable large number of individuals who inquire electronically about employment opportunities with contractors, it is critical that the Internet Applicant definition include the "advertised, basic qualifications" as a clear, required element. It would assist employers if the OFCCP would clarify how an individual's expression of interest indicates the "advertised, basic qualifications" and/or how employers may determine this from individual expressions of interest.

Without this essential element in the definition, employers would be faced with an unduly burdensome task of obtaining race, ethnicity and gender information from and tracking and maintaining records of hundreds of thousands of individuals who do not meet advertised, basic qualifications, most of whom submit unsolicited resumes. To Southwest's knowledge, at this time, there is no technology or computerized product available to employers to meet such a costly and daunting task. The work hours and expense involved for employers to comply with the UGESP proposed definition would be enormous and excessive.

**Dual Standard for Applicants Unworkable for Contractors Subject to Both Executive Order 11246 and Title VII of the Civil Rights Act**

In the NPRM, the OFCCP invites public comments on the fact that there are dual standards proposed under its NPRM and under the UGESP. 69 F.R. 16447-48. Indeed, there are several dual standards proposed through the NPRM and the UGESP: 1) dual standards for defining an "Internet applicant"; 2) dual standards for defining an "Internet applicant" and a traditional applicant, respectively; and 3) dual standards for recordkeeping requirements. (See comments below regarding recordkeeping). This is an untenable situation for contractors subject to both Executive Order 11246 and the UGESP.

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Southwest, Motorola, and Computer Associates support a single uniform applicant definition in line with the OFCCP NPRM for both "Internet applicant" and traditional applicant under both the OFCCP regulations and the UGESP. This approach would facilitate providing the OFCCP with meaningful contractor data for its compliance efforts, and enable contractors to readily comply with data collection, tracking and recordkeeping requirements for applicants. It would likewise accomplish the purposes of the UGESP to monitor selection procedures. The reality is that contractors/employers select from those individuals expressing interest who meet advertised, basic qualifications. The current dual standards, if adopted, will lead to confusion among employers and tremendous cost to employers and contractors to establish dual processes and to attempt to comply with the overly broad UGESP standard, as proposed.

**COMMENTS TO SECTION 60-1.12 PROPOSAL**

**Dual Recordkeeping Requirements Should be Streamlined**

Because of the dual applicant standards proposed by the OFCCP and the UGESP, if the proposals go into effect, contractors would face dual recordkeeping obligations. Southwest, Motorola and Computer Associates urge that the OFCCP and the UGESP adopt a uniform recordkeeping requirement as to applicants and Internet applicants in line with the recordkeeping requirements proposed by the OFCCP in the NPRM. Otherwise, contractors which are subject to both Executive Order 11246 and the UGESP, will face tremendously excessive costs and employee time to establish and maintain dual recordkeeping processes on an ongoing basis. Part of this effort will involve researching and indeed developing a solution to track and maintain records under the overly broad UGESP standard. In the event a uniform recordkeeping standard is not adopted by the OFCCP and the UGESP, Southwest, Motorola and Computer Associates urge the OFCCP and the Equal Employment Opportunity Commission ("EEOC") to provide contractors with a reasonable and sufficient period of time before these requirements become effective. This time is necessary for contractors to develop a solution to meet the recordkeeping requirements.

Thank you for your consideration of these comments. Please contact me if you have any questions or if we can provide additional information to you.

Respectfully submitted,

Cynthia S. Fox

xc: Beverly K. Carnichael, Southwest Airlines Vice President People  
Debby Ackerman, Southwest Airlines Vice President & General Counsel  
Frank Stockton, Southwest Airlines Director – People Relations & Compliance  
Jill A. Goldy, Vice President and Director Labor & Employment Law, Motorola, Inc.  
Joel Katz, Vice President & Assistant General Counsel, Computer Associates International, Inc.

**Subject:** Comments: Proposed Amendment 41 CFR Part 60-1  
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**From:** Cindy Fox

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